# DEPARTMENT OF JUSTICE

# Merger Reviews: Do They Take Too Long?

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The theme of this year's Fall Forum is antitrust enforcement predictability. One aspect of antitrust enforcement has been entirely too predictable in recent years: Merger reviews take a long time. And the amount of time is getting longer, not shorter. I'm Don Kempf, the Antitrust Division's DAAG for Litigation, and I'd like to address that.

According to one source, in 2016, significant merger reviews took an average of 11.6 months to complete—a new high and a steady increase since 2011, when the average significant merger took just over 7 months to review.[1]

So, what happened? And why? Under HSR, second requests give the agencies the opportunity to request any additional information beyond what the parties provided in their initial HSR filings. As originally envisioned, the goal was to help the agency decide whether or not to seek a preliminary injunction blocking the merger during the pendency of a case it would thereafter bring on the merits. If a preliminary injunction was granted, the parties subsequently could obtain information needed to support their case on the merits in normal discovery.

But the process has changed. Over time, the preliminary injunction proceedings have become like mini-trials on the merits. Indeed, at the Division, recent cases have been litigated on the merits in the first instance. And even PI proceedings can have the same effect as a trial on the merits, because, if the agency wins the PI, parties typically abandon their transaction, while, if the agency loses, it typically does not pursue a permanent injunction—beyond, of course trying to overturn the district court's decision on an expedited appeal.[2]

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[1] Paul T. Denis, Michael L. Weiner, and Rani A. Habash, *DAMITT Q3 Update: Significant US Antitrust Merger Investigations and Complaints Are Down Sharply But Taking Longer* (October 9, 2017), https://info.dechert.com/10/9471/october-2017/damitt-q3-2017-update.asp.

[2] Debbie Feinstein, *2 Changes to Commission Rule 3.26 re: Part 3 proceedings following federal court denial of a preliminary injunction* (March 16, 2015), https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/changes-commission-rule-326-re-part-3-proceedings. When I served on the Antitrust Modernization Commission a decade ago, I advocated for "a return to fast-track HSR review, followed by an expeditious PI proceeding and, if needed, a full trial on the merits." Today, however, I am not urging that we adopt that approach because I've concluded we can shorten

Some have said that the lengthening time of merger reviews is the merging parties' fault.[3] The parties might, for example, delay making their HSR filings in order to allow time for an initial meeting with the agency before the initial waiting period begins, or to synchronize schedules with the reviews of foreign antitrust enforcers. The parties also control the pace and timing of document production, and they can exercise that control to their strategic advantage. My view, however, is that there are other reasons as well. The government has a hand in the pace of merger investigations too. And there can be other factors as well.

But I'm not here to cast blame. The more important question is what we can do going forward. The Antitrust Division's present leadership wants to reverse the trend by increasing the speed and reducing the burden of merger reviews. This will take effort on our part, ***and*** it will take effort on your part. Working together we can achieve it.

Most importantly, shortening merger reviews does more than just reduce the burdens on the merging parties and the Antitrust Division. It also, and more significantly, furthers the Antitrust Division's mission, which is to promote competition. This notion traces its roots back nearly forty years. The 1982 Merger Guidelines captured the concept nicely, and the point is still valid today. They put it this way: "While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral."[4] Assistant Attorney General Tom Barnett made a similar point in 2007: "Our goal as antitrust enforcers is expeditiously to separate the few transactions that have the potential to result in a substantial lessening of competition from the many that do not, and to get out of the way of the latter as quickly as we can so that the parties can begin achieving any efficiencies as soon as

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merger reviews without making such a change. Taking the "one-bite-at-the-apple" approach as a given, there is more we can do.

[3] Alexei Alexis, FTC Attributes Merger Review Delays to Companies, BNA (June 14, 2017), https://www.bna.com/ftc-attributes-merger-n73014453336/.

[4] U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES (1982), https://www.justice.gov/archives/atr/1982-merger-guidelines.

possible."[5] Stated differently, delaying procompetitive mergers is anticompetitive, and that's not the business the Antitrust Division wants to be in. Just the opposite.

So how can we work together to reduce unnecessary burdens and speed merger reviews? I have a few suggestions:

First, we at the agencies can strive to identify and clear more transactions that do not threaten harm to competition during the initial HSR waiting period without issuing a second request. To help facilitate this, if you are aware of competitive issues from the get-go, meet with us early and often. Help us investigate quickly by being ready to provide information such as lists of overlapping products, strategic and marketing plans, and lists of top customers early in the waiting period. If you push for early termination, do what you can to get us there.

Second, when a second request appears necessary, tell us how you think we can make the investigation more efficient by improving our ability to identify the information we need to make our enforcement decisions. We know that second requests can be burdensome. I saw one downside to broad second requests when I was in the defense bar: they impose a huge burden on parties to produce the documents. Now that I've joined the government I've seen another downside: it's also a huge burden on the government to review them. Our goal should not be ***more*** information, but ***better*** information. The Division is looking for relevant documents, not a needle in a haystack.

Third, work with us so that we at the Division can tailor our document requests to limit the universe of responsive documents to those most likely to be relevant to assessing whether the likely effect of the transaction may be substantially to lessen competition. All of the Division's second requests are preliminarily based on our model second request, which is available on our website. We continually revise the model to try to clarify definitions, reduce burdens, and address issues that

[5] Thomas O. Barnett, *Merger Review: A Quest for Efficiency*, Remarks before the New York State Bar Association Antitrust Section Annual Meeting (January 25, 2007), https://www.justice.gov/atr/speech/merger-review-quest-efficiency.

have arisen in past investigations. We welcome suggestions from the parties of ways we can further tailor our requests in specific investigations without compromising the quality of the information that will be produced.

Fourth, I would urge the parties to provide relevant information early in the investigation. For example, the parties can make business people available for interviews without delay. The parties can prioritize certain custodians or certain categories of documents. And documents can be produced on a rolling basis rather than altogether at the end of the gathering process. In addition, the prompt production of data will speed our economic analysis of the likely competitive effects of the transaction.

Fifth, we at the Division will endeavor to reduce the number of custodians whose documents we request. In many routine investigations, the incremental benefit of seeking documents from additional custodians or from investigating additional markets is small in comparison with the burdens the additional requests impose on parties. Again, we welcome suggestions from the parties as to ways to reduce the number of custodians while ensuring that the necessary relevant documents are produced.

Working together this way, you will be able to produce information faster, and we will be able to review it faster.

The parties' role in – and the Division's commitment to – shortening merger reviews does not end with substantial compliance. Negotiating consent decrees can be a lengthy process. And the timing of decree negotiations can be used for strategic advantages. Earlier today, Assistant Attorney General Makan Delrahim described his views on consent decrees. As he said, the Antitrust Division's present leadership is less interested in behavioral remedies and more interested in structural remedies. Behavioral remedies can be appropriate in some instances, of course, but we do not view ourselves as regulators, and we cannot predict market conditions in the future. So we

do not want to hamstring the merged entity going forward. Rather, we want to unleash it to compete. And narrowing the universe of remedies likely to be on the table, should also help shorten decree negotiations.[6]

Our commitment to shortening merger reviews will result in real benefits for both merging parties and for the Division. Most importantly, if we can work together to accelerate the benefits of procompetitive transactions, consumers will be the big winners.

[6] The Division's commitment to shortening merger reviews does not reflect any hesitation to challenge transactions when warranted. As you have likely heard before, the Division is proud of its trial capabilities, which, when put to the test in recent years, have passed with flying colors.